In the Supreme Court of the United States

OCTOBER TERM, 1970

No. 982

ROBERT Y. ECKELS, ET AL., PETITIONERS

v.

DELORES ROSS, ET AL., AND UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 66–89) is not yet reported. The decisions of the district court (Pet. App. 1–65) are also unreported.

JURISDICTION

The judgment of the court of appeals was entered on August 25, 1970, and the mandate issued immediately. The petition for a writ of certiorari was filed on November 18, 1970. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

412-178—70——1

QUESTION PRESENTED

Whether, in the circumstances of this case, it was proper for the court of appeals to order certain modifications in the school desegregation plan approved by the district court.

STATEMENT

This is a school desegregation case involving the Houston, Texas, Independent School District. Recent proceedings commenced when the private plaintiffs, in July 1968, and the United States, plaintiff-intervenor, in February 1969, filed motions for supplemental relief based on this Court's decisions in *Green* v. *County School Board,* 391 U.S. 430; *Raney* v. *Board of Education,* 391 U.S. 443, and *Monroe* v. *Board of Commissioners,* 391 U.S. 450. Evidentiary hearings were held in July 1969 and April and May 1970; during the course of those proceedings several desegregation plans, described in the opinion of the court below (Pet. App. 70–78), were submitted to the district court. The petitioners proposed three alternative plans, a freedom-of-choice plan and two plans based solely on geographic zoning. Other alternatives were supported by the plaintiffs and the government.

The district court adopted one of the petitioners' geographic-zoning plans, and both the plaintiffs and the government appealed, urging the court of appeals to reverse and remand with directions to the district court to adopt other alternatives shown to be more effective. The Court of Appeals for the Fifth Circuit affirmed in part and reversed in part the district court's

decree. The district court was directed to adopt as to secondary schools the school board's alternative geographic-zoning plan and to require as to elementary schools that eleven specified school pairings and one zone-boundary change be superimposed on the plan approved by the district court.[1] The court of appeals also directed, however, that "alternatively the [district] court may adopt any other plan submitted by the school board or other interested parties, provided, of course, that such alternate plan achieves at least the same degree of desegregation as that reached by our modifications" [Pet. App. 82].

ARGUMENT

In our view this petition presents no issues warranting review by this Court and, accordingly, should be denied.

1. The plan approved by the court of appeals is basically a combination of proposals made by the school board, with the exception of the pairings directed by that court. Indeed, as the petitioners point out (Pet. 9), even the appellate court's modifications did not greatly enhance the effectiveness of those proposals in achieving desegregation. Nevertheless, both the petitioners and the district court categorically declined to adopt a range of techniques to promote desegregation, such as pairing, grouping, and con-

[1] The court of appeals denied a motion by the school board to stay the pairing order pending application in this Court for a writ of certiorari. The district court has not yet issued an order on remand.

solidating schools and altering school grade structures, which have been approved by this Court and the courts of appeals. See, *e.g., Green* v. *County School Board, supra* at 438 n. 6; *Swann* v. *Charlotte-Mecklenburg Board of Education,* 431 F. 2d 138 (C.A. 4); *Dowell* v. *Board of Education of Oklahoma City,* 438 F. 2d 865 (C.A. 10); *Singleton* v. *Jackson Municipal Separate School District,* No. 29, 226 (C.A. 5, Aug. 12, 1970). In these circumstances, and in view of ~~the one~~ court's invitation to the petitioners to submit equally effective alternative proposals, the Fifth Circuit's order directing implementation of school pairings clearly was not reversible error. See *Alexander* v. *Holmes County Board of Education,* 396 U.S. 19.

2. Issues presented by petitioners' miscellaneous arguments concerning the affirmative duty of school boards to be conscious of the racial consequences of their decisions are presently before this Court in *Swann* v. *Charlotte-Mecklenburg Board of Education,* Nos. 281 & 349, this Term, and *Davis* v. *Board of School Commissioners of Mobile County,* No. 436, this Term. Insofar as this Court's decision in those cases may affect the issues decided in this case, appropriate motions for supplemental relief or modification may be presented to the courts below.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be denied.

Respectfully submitted.

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